Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RANDALL WARE, RICHARD KAUAHQUO, CAROL FRAME, WILLIAM TARTSAH AND WENDELL AUTAUBO, in Their Capacity as Commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma, an Indian Housing Authority,

Petitioners,

v.

HOUSING AUTHORITY OF THE KIOWA TRIBE OF OKLAHOMA, an Indian Housing Authority, and ART UNAP, JR., DOROTHY PALMER AND SANDRA QUOETONE, in Their Capacity as Officers and Commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma,

Respondents.

On Petition for a Writ of Certiorari to the Oklahoma Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an Oklahoma statute, enacted pursuant to the United States Housing Act of 1937, and intended to help in creation of Indian Housing Authorities, also creates jurisdiction in Oklahoma courts to rule upon a tribal political dispute and dictate the political processes a tribe must use to select members of the governing body of the tribe's Indian Housing Authority?

LIST OF PARTIES

Mr. Randall Ware, Mr. Richard Kauahquo, Ms. Carol Frame, Mr. William Tartsah and Mr. Wendell Autaubo, in their capacity as commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma, an Indian Housing Authority formed and operated pursuant to the United States Housing Act of 1937,

Petitioners

Housing Authority of the Kiowa Tribe of Oklahoma, an Indian Housing Authority formed and operated pursuant to the United States Housing Act of 1937; Mr. Art Unap, Jr., Ms. Dorothy Palmer and Ms. Sandra Quoetone, all in their capacity as officers and commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma,

Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Petitioners, Mr. Randal Ware, Mr. Richard Kauahquo, Ms. Carol Frame, Mr. William Tartsah and Mr. Wendell Autaubo, acting in their capacity as commissioners of the Housing Authority of the Kiowa Tribe of Oklahoma, respectfully pray that a writ of certiorari issue to review the decree of the Supreme Court of Oklahoma entered on July18, 2000.

OPINION BELOW

The opinion of the Oklahoma Supreme Court is reported at _____ P.3d _____ (Okla. 2000). It is styled *Housing Authority of the Kiowa Tribe of Oklahoma v. Randall Ware, Supreme Court of Oklahoma, No. 93295*. The text of the opinion is reproduced in the Appendix, p. 1-10.

JURISDICTION

The opinion of the Oklahoma Supreme Court was entered July 18, 2000. The Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

STATEMENT OF NOTIFICATION UNDER RULE 29.(4)(c) SUPREME COURT RULES

Petitioners state that 28 U.S.C. § 2403(b) may apply. This proceeding may draw into question the constitutionality of 63 O.S. § 1057, as applied in this case. Housing Authority of the Kiowa Tribe of Oklahoma may not be an "agency" of the State of Oklahoma within the intent and purpose of 28 U.S.C. § 2403(b).

A copy of this Petition for Writ of Certiorari will be served upon the Honorable Drew Edmondson, Attorney General, State of Oklahoma.

CONSTITUTION PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution:

> "The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

Article VI of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be

made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

24 Code of Federal Regulations § 905.108(b) (Repealed). Reproduced in Appendix, p. 15.

Title 63 O.S. § 1057. Reproduced in Appendix, p. 16.

STATEMENT OF THE CASE

INTRODUCTORY EXPLANATION

This petition challenges Oklahoma's exercise of judicial power to dictate the political processes that the Kiowa Tribe of Oklahoma ("Kiowa") must use to select members of the governing body of Housing Authority of the Kiowa Tribe of Oklahoma ("KHA").

KHA is an Indian Housing Authority originally operated under the United States Housing Act of 1937. Oklahoma courts exercise their judicial power on the theory that an Oklahoma statute has made Indian Housing Authorities "agencies" of the State, and that Oklahoma courts have "inherent" jurisdiction over Indian Housing Authorities, until Congress explicitly removes that jurisdiction.

Indian tribes operated Indian Housing Authorities under the United States Housing Act of 1937. The United States authorized tribes lacking an adequate tribal government to

organize Indian Housing Authorities under state statutes that made provisions for Indian Housing Authorities.

In 1965, in response to federal authorization, Oklahoma enacted its Indian Housing Authority Act, 63 O.S. § 1057. (Appendix, p. 16). That Oklahoma law specifically designated an Indian Housing Authority as ". . . an agency of the State of Oklahoma . . ." even though tribes were empowered to select the members of the governing bodies and funding came from the United States directly to tribes.

The blending of Federal, tribal and state sovereignty in Indian Housing Authorities in Oklahoma has yielded conflicting case law. The United States Court of Appeals for the Tenth Circuit and the Oklahoma Supreme Court have used different analytical approaches and reached opposite results. Essentially, the Tenth Circuit approach is designed to protect tribal sovereign power. The Oklahoma approach is designed to protect Oklahoma sovereign power, at the expense of the tribe.

The Tenth Circuit proceeds upon the principle that characterizations of Indian Housing Authorities as both a "state agency" and as a "tribal organization" are not mutually inconsistent. *Housing Authority of the Kaw Tribe v. City of Ponca City*, 952 F.2d 1183 (10th Cir. 1991). Thus, the Tenth Circuit examines the purpose of a statute or a regulation sought to be applied to an Indian Housing Authority. The Tenth Circuit then uses flexibility to decide whether, under the statute or regulation in question, Indian Housing Authorities must be deemed Indian "tribes" that

benefit from the privileges and immunities of an Indian tribe. *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123 (10th Cir. 1999). Any ambiguity is construed in favor of the conclusion that the Indian Housing Authority is an Indian tribe. *Duke*, 199 F.3d at 1125. By this approach, the Tenth Circuit protects from infringement tribal sovereignty, tribal self-determination and tribal self-government.

On the other hand, the Oklahoma Supreme Court proceeds upon the theory that due to 63 O.S. § 1057 it has jurisdiction, at least to control the political process of selecting commissioners of an Indian Housing Authority and perhaps even over a "Housing Authority and its activities". *Housing Authority of Choctaw Nation v. Craytor*, 600 P.2d 314 (Okla. 1979). Consistent with *Craytor*, but independent of 63 O.S. § 1057, the Oklahoma Supreme Court also holds that Oklahoma has "inherent" jurisdiction which can be limited only if Congress explicitly withdraws state court power over Indian Housing Authorities. *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (Okla. 1994), *cert. denied*, 516 U.S. 975, 116 S.Ct. 476, 133 L.Ed.2d 405 (1995) (state court ordered Indian Housing Authority to convey mineral interest to tribal member and to account and pay over profits the Housing Authority had realized from that mineral interest.) By this approach, the Oklahoma Supreme Court expands and protects Oklahoma sovereignty.

By applying 63 O.S. § 1057 along with an expansive view of inherent jurisdiction, Oklahoma courts are dictating

to Kiowa the tribal political process that must be used in selecting members of the governing body for KHA. By doing this, Oklahoma infringed upon Kiowa's inherent sovereign right to make its own laws in internal matters. *See*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). According to Oklahoma, Kiowa cannot adopt a tribal law to select a different political process to choose KHA commissioners.

The infringement is not limited to interference with Kiowa's right to designate its own political processes to select Indian Housing Authority commissioners. Because Oklahoma courts have chosen the proper tribal political process, Oklahoma courts have intruded upon a function properly left to the tribal forum for dispute resolution. This dispute should be resolved by boards created under the Kiowa Constitution and by Kiowa's tribal court -- a Code of Federal Regulations Court.

FACTS

Kiowa is a federally recognized Indian tribe. (61 Fed. Reg. 58, 211). KHA is an Indian Housing Authority that Kiowa authorized and ran under the United States Housing Act of 1937. (Tr., Def. Ex. 7).

The United States Housing Act of 1937 permitted tribes to run tribal housing programs. Not all Indian tribes, though, had a tribal governmental structure adequate to form an Indian Housing Authority under this Act. Because of this, such tribes were allowed to create an Indian Housing

Authority pursuant to state laws "which provide for establishment of IHA's with all necessary legal power to carry out low income housing projects for Indians." *See, e.g.*, 24 C.F.R. § 905.108(b) (C.F.R. 89). (repealed)

To accommodate tribes under the 1937 Act, in 1965, the Oklahoma Legislature amended the Oklahoma Housing Authority Act, 63 O.S. §1051, *et seq. See, Eaves v. State of Oklahoma*, 795 P.2d 1060, 1062-3 (Okla. Crim. App. 1990) (dissenting opinion, recognizing that the Oklahoma legislature acted in response to federal regulation). This new Oklahoma statute created a housing authority for each tribe in Oklahoma. Each tribe could choose to use that housing authority by enacting a tribal resolution declaring a need for a housing authority.

Generally, 63 O.S. § 1057 (Appendix, p. 16) provided a structure for governing these housing authorities, but left selection of members of the governing structure to tribal political action. The Oklahoma statute directed that these Indian Housing Authorities were to be governed by five commissioners. It left the actual selection of those commissioners to the ". . . Chief or other governing head. . ." of each tribe. Of particular significance to this case is that the Oklahoma statute declared that each Indian Housing Authority was ". . . an agency of the State of Oklahoma . . . ."

In 1969, Kiowa had only an interim tribal government. It was one of many tribes that lacked a tribal government adequate to form an Indian Housing Authority. Thus, Kiowa

enacted a tribal resolution that activated KHA pursuant to 63 O.S. §1057. (Tr., Def. Ex. 7-9).

Virtually from the inception, Kiowa experienced intra-tribal controversy concerning the proper tribal political mechanism to select KHA commissioners. In some instances, they were selected by popular vote of the entire tribe -- a body called the Kiowa Indian Council. Some tribal members viewed the Kiowa Indian Council as the "governing head" of the tribe. In other instances, commissioners were appointed by the Chairman of the Kiowa Business Committee -- a tribal constitutional body that has been delegated both executive and legislative powers. Some tribal members viewed the Chairman of the Kiowa Business Committee as the ". . . Chief or other governing head. . ." of the tribe. (Tr. 23-30; 43-47).

Eventually, KHA's five member board of commissioners shrank to three people, the Respondents, Mr. Art Unap, Jr., Ms. Dorothy Palmer and Ms. Sandra Quoetone ("Respondents"). Currently, the terms of each of the Respondents have long since expired by passage of time. (Tr. Def. Ex. 4, p. 2). For example, Mr. Unap, Jr. testified that he has served 12 years, but he was only elected for 2 terms, of 1 to 3 years each. His term expired but he was never replaced and so he was able to keep his office indefinitely. (Tr. 31-32.)

These Respondent hold-over commissioners had not been replaced because there had been no tribal election for new KHA commissioners. There had been no election

because KHA, under the direction of the hold-over commissioners, refused to pay to the tribe the funds necessary to place an election of KHA commissioners on a tribal election ballot. (Tr. 30-32; 49-52; Def. Ex. 3).

This tribal "deadlock" over the selection of KHA commissioners produced more controversy in 1996, after Congress enacted the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §4101, *et seq.* ("NAHASDA") to replace tribal housing programs conducted under the United States Housing Act of 1937.

The Kiowa Business Committee, acting as a constitutionally created tribal body, took tribal political action to start a tribal housing program under NAHASDA. The Kiowa Business Committee's action caused a political dispute with Respondents. This dispute culminated in a lawsuit filed by KHA and its hold-over commissioners against the members of the Kiowa Business Committee. *Housing Authority of the Kiowa Tribe of Oklahoma v. Billy Evan Horse, et al.*, No. CIV-97-A52, Court of Indian Offenses for the Kiowa Tribe, Anadarko, Oklahoma. In this lawsuit, KHA denominated itself a "state agency" and attacked the validity of the Kiowa Business Committee's action under NAHASDA.

To address disputes from the KHA hold-over commissioners and to provide KHA with a full five member board, with terms that were unexpired, the Chairman of the Kiowa Business Committee, acting under tribal law,

appointed Petitioners as the new KHA commissioners. (Tr., Def. Ex.5).

Respondent hold-over commissioners refused to recognize Petitioners as the new legally appointed KHA commissioners and refused to yield their office to them. Respondent hold-over commissioners retained actual physical control of KHA. They asserted that under the Oklahoma statute, 63 O.S. §1057, KHA was an Oklahoma state agency, and that they were state officials. They asserted that because KHA was a state agency, Oklahoma law dictated the tribal political process of selecting commissioners. Respondents claimed that Oklahoma law required that their positions be filled by popular election by the tribe as a whole. They also claimed that KHA could not be required to use its own funds to pay for such an election. As a result, Respondents claimed, under Oklahoma law, they legally remained in office, expired terms or not, until they were replaced by the tribal election. (R. 85-143).

Respondents drew support from Oklahoma Supreme Court case law. In *Housing Authority of Choctaw Nation v. Craytor*, 600 P.2d 314 (Okla. 1979), the Oklahoma Supreme Court examined another tribe's housing authority formed pursuant to 63 O.S. § 1057. It concluded that the tribe's political process of selecting commissioners was controlled by state law, not tribal law. Hence, a tribal political dispute over that selection process was subject to state court jurisdiction. The Oklahoma Supreme Court's apparent rationale was that 63 O.S. § 1057 converted the dispute into a "Housing Authority" matter that was controlled by

Oklahoma law. Such a dispute was not an "intra-tribal matter" that was beyond Oklahoma law.

Respondent hold-over commissioners challenged the action of the Kiowa Business Committee in appointing Petitioners to replace them as new KHA commissioners. Theys sued Petitioners in Oklahoma state courts seeking a state court declaration that Respondents were legally commissioners of KHA. Likely, Respondents selected the state forum to benefit from *Craytor* and because a federal forum was unavailable. *See*, *Ware v. Richardson*, 347 F.Supp. 344 (W.D. Okla. 1972) (a dispute between Kiowa tribal members and KHA, including a dispute over the proper political mechanism for selecting KHA commissioners, was "intra-tribal" and beyond federal court jurisdiction).

In Respondents' state court suit, *Housing Authority of the Kiowa Tribe of Oklahoma v. Ware*, No. CJ-98-118, District Court of Caddo County, Respondents denominated KHA "an agency of the State of Oklahoma" and claimed state court jurisdiction under *Craytor*. Respondents alleged that state law, 63 O.S. §1057, controlled the tribal political process for selecting KHA commissioners. They asserted that Oklahoma law applied to the Kiowa Tribe and required it to conduct a popular election to replace them. (R. 1-52; 85-143).

Petitioners answered and counterclaimed. (Appendix 17-19). They alleged that Respondents' terms of office had expired, and that under tribal law Petitioners were the new, properly appointed commissioners. (R. 53-58).

In deference to *Craytor*, Petitioners alleged that even if Oklahoma law controlled, that law upheld the propriety of the Kiowa tribal political process used to appoint them. (R. 144-159).

Petitioners also alleged that Respondents' claim of right to their offices under state law and their state court suit to enforce that right was a significant interference with Kiowa's right to self-government. (R. 53-58). Petitioners also asserted that the state court lacked subject matter jurisdiction because there was neither tribal nor Congressional consent to suit. (R. 78-84). (Appendix 20-21). At trial, Petitioners renewed their challenge to state court jurisdiction by oral motion, which was overruled from the bench. (Appendix 22-24).

The District Court of Caddo County found that it had jurisdiction under *Craytor*. It then construed the Kiowa Constitution and placed the tribal political power to select commissioners in the entire body of the tribe, and not in the Chairman of the Kiowa Business Committee. (Appendix 11-14). Hence, the District Court of Caddo County voided political action taken under tribal law and ruled that state law required Respondents be replaced only through a Kiowa general tribal election. (R. 287-289). The state court order is reproduced in the Appendix at p. 11-14.

Petitioners appealed to the Oklahoma Supreme Court. Again, Petitioners asserted that they were properly appointed under tribal law. Nonetheless, in deference to *Craytor*, Petitioners argued that even if Oklahoma law applied, they were still properly appointed to office. This was so, they urged, because Oklahoma law, properly interpreted and applied to Kiowa's tribal political structure, should yield a result consistent with tribal law.

But, Petitioners further argued, if applying Oklahoma law invalidated their appointments as the new KHA commissioners – appointments legal under tribal law -- then the Oklahoma law was an impermissible infringement upon tribal self-determination and tribal self-government. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed..2d 251 (1959). (Appendix, p. 25).

Further, Petitioners argued that KHA was an integral part of Kiowa, a federally recognized Indian tribe. As duly appointed political officers of a tribal sovereign, who were asserting the right to the political offices of the tribal sovereign, Petitioners enjoyed tribal sovereign's immunity to suit. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed.2d 1628 (1949). Because of this immunity to unconsented suit, Oklahoma courts had no subject matter jurisdiction unless there was either Congressional or tribal consent to suit. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,*

Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).[1]

Respondent hold-over commissioners filed no brief in the Oklahoma Supreme Court. The Oklahoma Supreme Court decided the case in the absence of any response from them, because it was a "case . . . of a public nature."

The Oklahoma Supreme Court concluded that its decision in *Craytor* established that state courts had jurisdiction over disputes concerning a tribe's political process in selecting the commissioners of its Indian Housing Authority. The issue was viewed as a question of state law. The Oklahoma Supreme Court plainly indorsed the *Craytor* concept that a tribal dispute over the political mechanism of selecting the members of the governing body of the tribe's Indian Housing Authority was not "intra-tribal". Rather it was within state judicial power.

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[1] In 1998, this Court established in *Manufacturing Technologies* that Kiowa's tribal immunity to suit was a matter of federal law, not subject to diminution by Oklahoma courts. In this case, though, the Oklahoma Supreme Court avoided the *Manufacturing Technology* holding by concluding: (1) that it was deciding a question of "state law" by interpreting a state statute and (2) it was individual tribal members, instead of the tribe, that were sued.

Next, the Oklahoma Supreme Court analyzed Kiowa governmental structure and Kiowa law to determine where state law had placed power for selecting KHA commissioners. The Oklahoma Supreme Court chose a tribal election, rather than appointment by the Kiowa Business Committee Chairman. As a result, the Oklahoma court used state law to void the tribal political action that appointed Petitioners as the new KHA commissioners.

REASONS FOR GRANTING THE WRIT

OKLAHOMA CANNOT USE STATE LAW TO DICTATE TRIBAL POLITICAL PROCESSES BECAUSE IT CREATES A PROFOUND INFRINGEMENT UPON TRIBAL SELF-GOVERNMENT THAT DIRECTLY VIOLATES THIS COURT'S DECISIONS.

Kiowa must be free of dictates of Oklahoma law when engaging in the political process of selecting commissioners to govern its tribal Indian Housing Authority. This is so because of Kiowa's inherent sovereign rights and because of Congress' policy of promoting tribal self-determination and self-government. The inherent sovereignty of Kiowa, and Congress' policy of promoting tribal self-government make no allowance for Oklahoma to infringe so deeply in such basic matters of tribal self-government. There is no "state law" issue here.

Kiowa is a domestic dependent nation, which is a direct continuation of one of the "self-governing political communities that were formed long before Europeans first settled in North America." *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L.Ed. 25 (1831); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). As a domestic dependent nation, Kiowa has the inherent power to make its own substantive law in internal matters and to enforce that law in its own forum. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

The United States recognizes Kiowa as a domestic dependent sovereign and maintains a government-to-government relationship with Kiowa. 25 C.F.R. §83.2. Under the Constitution, Indian relations are the "exclusive province of federal law." *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). Congress, through exercise of its power under the Indian Commerce Clause, is the sole source of this nation's policy for Indian affairs. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). In the area of Indian affairs, states are divested of virtually all authority. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

Congress, as the source of this nation's policy for Indian affairs, has created and implemented a policy of promoting tribal self-determination. *See, e.g.,* 25 U.S.C. §450(a). Pursuant to this policy, Congress supports and

assists Indian tribes in developing strong and stable tribal governments that can operate quality programs and economies within tribal communities. 25 U.S.C. § 450(b). In support of this effort, this Court has emphasized that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1087, 1092, 94 L.Ed.2d 244 (1987). States have no power to infringe upon tribal self-government. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

Plainly, this federal policy of developing and protecting tribal governments must limit the reach of state governments. This limit is necessary because the exercise of state sovereign power cannot be allowed to crush tribal sovereigns. For this reason, instances in which tribes may be subjected to state law or regulation are limited to situations where state laws or regulations are not preempted by Congress, and do not infringe upon tribal self-government. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

As an ultimate protection of tribal sovereignty, Congress, and this Court, provide that tribes are not subject to the power of state courts unless either the tribe or Congress create state court power by a consent to suit. *See, e.g.*, 25 U.S.C. § 1451, *et seq.*, 25 U.S.C. § 450n(1); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 111 S.Ct. 905, 112

L.Ed.2d 1112 (1991). (Recognizing tribal obligation to collect state taxes on certain tobacco sales, but holding tribe immune to suit by state for failure to collect those taxes.)

Federal Indian housing programs are an important part of Congress' policy of development strong tribal governments that can operate quality programs. Congress intends that its Indian housing programs will function as a part of an Indian tribe's governing activity. Originally, Indian Housing Authorities were created pursuant to the United States Housing Act of 1937. Indian Housing Authorities were then envisioned as entities intended to receive federal funds and to work with federal, tribal and community organizations to provide better housing. *See, e.g.*, 24 CFR § 905.101 *et seq.* (1988).

NAHASDA replaced the United States Housing Act of 1937 programs that related to Indian tribes and developed more fully Congress' policy of promoting Indian self-determination. To provide continuity in Indian housing programs, Congress required in NAHASDA that newly authorized "tribally designated housing entities" take steps to "protect and maintain" housing developed under the 1937 Act. Thus, Indian housing programs, including those started under the 1937 Act, now proceed upon Congress' strong emphasis on tribal self-determination and self-government in NAHASDA.

In NAHASDA, Congress emphasized the importance of tribal housing programs as part of its policy of promoting Indian self-determination and tribal self-government.

Congress specifically said that the United States should recognize ". . . the right of Indian self-determination and self-government by making . . . assistance available directly to Indian tribes or tribally designated entities . . . ." 25 U.S.C. § 4101(7).

Congress also used NAHASDA to touch upon the proper role of state governments concerning tribal housing programs. It explained that it wished to encourage ". . . effective partnerships among the Federal Government, State, tribal and local governments . . . ." 25 U.S.C. § 4101(1)(C).

Key to understanding the nature of Congress' policy is that Congress described the intended relationship among the various sovereigns as "partnerships." Inherently, "partnerships" are relationships arising from agreement. *St. Clair Lime Co. v. Ada Lime Co.*, 162 P.2d 547 (Okla. 1945) (partnerships arise out of contracts). Partnerships do not arise from one party making a unilateral declaration of power over another -- as is the case here with Oklahoma's declaration of its power over Indian Housing Authorities. Congress did not intend to reduce Indian housing programs to the status of a state agency under state control nor did Congress indicate that it intended to give states the power to do so.

This excess of judicial power by Oklahoma also undermines Kiowa's judicial powers. If the sovereign right to self-government encompasses the power to make laws, then the reality and value of that power is lost unless there is

an ability to enforce those laws in the sovereign's own forums. *Santa Clara*, 98 S.Ct. at 1675.

Viewed in relation to the dispute at hand, it is plain that Oklahoma has taken from the tribal judicial system a basic function essential to self-government -- the adjudication of an internal dispute over the mechanisms of tribal government.[2] If Kiowa's tribal court has no power over such a dispute as this, either because of state court claims to jurisdiction or because KHA is a "state agency", then the result is inescapable damage to Kiowa's right to self-government. For example, both KHA and the tribal members that benefit from its programs are almost categorically barred from resolving any disputes in a tribal forum. Rather, both KHA and tribal members are forced into a state forum -- at best, an

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[2] The extent of Oklahoma's infringement upon tribal judicial power is further demonstrated by the Court of Indian Offenses' dismissal of Respondents' suit against members of the Kiowa Business Committee, referenced at page 9 of this Petition for Writ of Certiorari. The Honorable Phil Lujan, Magistrate, concluded that the Kiowa Court of Indian Offenses was without jurisdiction to rule upon the merits of the very tribal political dispute over housing programs that triggered this Petition for Writ of Certiorari. His rationale turned heavily upon the court's lack of power to enter orders against KHA, which he viewed as either a "state entity" or a "hybrid". Judge Lujan's order is reproduced in the Appendix at p. 26-28.

odd result from a federal program designed to promote self-determination and tribal self-government.

The United States policy concerning tribal courts recognizes the necessary connection between the power to make law and the power to enforce law. Thus, this Court has recognized that tribal courts play a vital role in tribal self-government. The Federal Government has consistently encourage development of tribal courts. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). This Court protects tribal courts from being undermined by the exercise of state court jurisdiction. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). This Court has even divested state courts of jurisdiction, as a matter of federal law, when state court jurisdiction interfered with tribal sovereignty and self-government. *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976).

This Court goes so far to protect tribal court jurisdiction that it does not allow a federal court to impair the authority of tribal courts. Thus, federal courts stay action until tribal courts have had full opportunity to determine their own jurisdiction. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Even Congress' grant of diversity jurisdiction to federal courts does not impair tribal court jurisdiction. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

Oklahoma courts do not follow this federal policy when they assume power to adjudicate what is an intra-tribal political dispute. They do not engage in the Tenth Circuit approach of recognizing that an Indian Housing Authority may be a "tribal organization" within some contexts. As a result, rather than taking the federal course and deferring to the tribal judicial system for a determination of its own jurisdiction, Oklahoma courts merely proceed as though no such tribal system exists.

As an Oklahoma based tribe, Kiowa is not alone in trying to protect its right to self-determination and self-government from this situation. There are 37 federally recognized Indian tribes in Oklahoma. Of these 37 tribes, 35 conduct housing programs, originally under the 1937 Act and now under NAHASDA. Each tribe must accept state law restrictions on its own sovereign power to make laws to select those who govern its housing program. Each tribal court must contend with Oklahoma courts that take power that should be left to a tribal forum.

The writ of certiorari should issue to prevent an infringement upon Kiowa's inherent sovereign right to make and be governed by its own laws, to protect its tribal court from undermining by exercise of state court jurisdiction and to protect Congress' policy of encouraging tribal self-determination and self-government.

CONCLUSION

A writ of certiorari should be granted to the Oklahoma Supreme Court.

Respectfully submitted,

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